IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 561-562.

UNITED STATES OF AMERICA,

v.

HAROLD GOTTFRIED and PURE ROCK MINERAL SPRINGS CORPORATION,

Petitioners.

UNITED STATES OF AMERICA,

v.

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners.

REPLY BRIEF FOR PETITIONERS.

Certain errors and misconceptions in the Government's brief prompt the following comments.

1. The statute of limitations issue is not, as the Government contends, limited to defendant Gottfried. Defendant Pure Rock is also affected by it since it was included only in the substantive indictment and not, as erroneously stated by the Government (Brief, p. 27), in the conspiracy indictment.

The suggestion that the writ be limited to this issue is disingenuous. If the prosecution on the substantive indictment was barred, the fairness of the trial must be reconsidered on that ground alone. This was recognized in the *Marzani* case, although the court concluded that the trial was, in fact, fair. That conclusion was reached with respect to the following circumstances: Marzani was indicted on eleven counts for substantially identical statements, made to secure or retain government service between 1942 and 1946. The statements were answers to questions whether Marzani had ever been a member of the Communist Party, and the like. The falsity was established by his activities in 1940 and 1941. There was, therefore, only a single issue, and the only additional proof required for the earlier counts was the fact that the statements were made—apparently not denied. Here, on the other hand, the indictments concerned different kinds of offenses, involved different defendants with a single exception, and perhaps half of the trial was devoted to the substantive indictment. Consolidation of the indictments for trial was granted over defendants' objections (R., p. 81), and is one of the actions sought to be reviewed (Petition, p. 6, item (4)). The propriety of this action becomes all the more questionable if the substantive indictment should not have been brought to trial. We submit further that the other issues would justify review even if the statute of limitations issue were absent.

2. With respect to the method of selection of jurors in the Southern District of New York, the Government has chosen to disregard the substantive problems of fairness, and limits its discussion to the single issue of whether an order to that effect can be inferred. Even on this narrow issue, the Government fails to mention the *May* case (Peti-

tion, p. 11), nor its earlier contention that *May* has been overruled by *Lewis,* despite the special facts and narrow limits of the latter.

If, as the Government contends, the clerk of the District Court, with the tacit acquiescence of the Judges of that Court, has effected a "division of the district" (Brief, p. 8), we submit that the clerk has usurped the function of the Congress, that the latter has never delegated such authority even to the court itself, that it has never exercised its own authority in this manner, and that its power to do so is questionable under the Sixth and Fourteenth Amendments. Certainly this Court has never ruled otherwise, and the contrary decision of the court below on such a fundamental issue should be reviewed.

3. With respect to the misconduct of the foreman of the jury, the Government has, we believe, fallen into error by failing to distinguish between the various acts of misconduct. That Van Voorhis, when he was improperly in the jury room, discussed the case with the other jurors, was a matter of surmise and counsel so stated in requesting an investigation.* That Van Voorhis *was* improperly in the jury room and that the clerk had to call him out was asserted as a fact in the presence of the clerk (R., p. 2319). That Van Voorhis had served on criminal juries not only in 1935, as discovered by accident, but also twice in 1944, twice in 1942, and earlier, was asserted by defense counsel as a fact (R., pp. 1901-3), after they had examined the records of the court pursuant to court direction (R., p. 1784).

The inference that defense counsel were content with the court's dilatory treatment of their motion is unwar-

* Of course, counsel could not approach the jurors, who had been admonished not to disclose what transpired.

ranted. The Assistant United States Attorney had confirmed that Van Voorhis had served in 1935 (R., p. 1781) but failed to supply his complete record, which he had promised (R., p. 1732). The court asked defense counsel to obtain the entire record (R., p. 1784). He also asked for legal memoranda (R., p. 1909). Should defense counsel have refused to comply? Could they have done so more rapidly in view of their preoccupation with the actual trial?

4. The Government's statement of the circumstances of the alleged "confession" proves too much. It seeks to eliminate the exercise of coercion, whereas the court below went no further than to hold that the effect of coercion had ceased (R., p. 2471). We did not attempt to do more than summarize the kinds of coercion which occurred.* Instances of continuing coercion, such as the following, cannot of course be disputed:

> "Mr. Bender:** Mr. Foreman, will you direct, on behalf of the Grand Jury, will you direct this witness that he shall maintain the oath of secrecy of the Grand Jury; . . .
>
> "The Foreman: I call your attention, Mr. Stanton, to the fact that all proceedings in the Grand Jury room are strictly secret. They are not to be discussed by you with anyone . . .
>
> "The Witness: May I ask a question?
>
> "The Foreman: Certainly.
>
> "The Witness: I'm not allowed legal counsel at all?
>
> "The Foreman: You are not allowed to discuss with your counsel what transpired in this room" (R., p. 2365).

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* Even the opinion below is not free from inaccuracies. For example, it states (R., p. 2469) that Stanton "signed a written confession," whereas Stanton neither signed nor saw the trascript (R., p. 780).

** Assistant United States Attorney.

It therefore remains the responsibility of this Court, "regardless of the contrary conclusions of the triers of facts," to determine from the "conceded facts" whether Stanton had "mental freedom to confess or deny." *Lyons* v. *Oklahoma*, 322 U. S. 596, 602 (1944).

Dated New York, March 10, 1948.

Respectfully submitted,

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